

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of ZTE Corporation)))))	File No. EB-09-SE-160 NAL/Acct. No. 201032100010 FRN 0009043175
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NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 14, 2010

Released: January 14, 2010

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that ZTE Corporation (“ZTE”) apparently willfully and repeatedly violated the wireless handset hearing aid compatibility status report filing requirements set forth in Section 20.19(i)(1) of the Commission’s Rules (“Rules”) and the public web site posting requirements set forth in Section 20.19(h) of the Rules.¹ For these apparent violations, we propose a forfeiture in the amount of eighteen thousand dollars (\$18,000).

II. BACKGROUND

2. In the 2003 *Hearing Aid Compatibility Order*, the Commission adopted several measures to enhance the ability of individuals with hearing disabilities to access digital wireless telecommunications.² The Commission established technical standards that digital wireless handsets must meet to be considered compatible with hearing aids operating in acoustic coupling and inductive coupling (telecoil) modes.³ The Commission further established, for each standard, deadlines by which manufacturers and service providers were required to offer specified numbers or percentages of digital wireless handsets per air interface⁴ that are compliant with the relevant standard if they did not come under the *de minimis* exception.⁵ In February 2008, as part of a comprehensive reconsideration of the

¹ 47 C.F.R. §§ 20.19(i)(1) and 20.19(h).

² The Commission adopted these requirements for digital wireless telephones under the authority of the Hearing Aid Compatibility Act of 1988, codified at Section 710(b)(2)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 610(b)(2)(C). See *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753, 16787 ¶ 89 (2003); Erratum, 18 FCC Rcd 18047 (2003) (“*Hearing Aid Compatibility Order*”); Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221 (2005) (“*Hearing Aid Compatibility Reconsideration Order*”).

³ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16777 ¶ 56; 47 C.F.R. §§ 20.19(b)(1) and (2).

⁴ The term “air interface” refers to the technical protocol that ensures compatibility between mobile radio service equipment, such as handsets, and the service provider’s base stations. Currently, the leading air interfaces include Code Division Multiple Access (CDMA), Global System for Mobile Communications (GSM), Integrated Dispatch Enhanced Network (iDEN) and Wideband Code Division Multiple Access (WCDMA) a/k/a Universal Mobile Telecommunications System (UMTS).

⁵ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780 ¶ 65; 47 C.F.R. §§ 20.19(c), (d). The *de minimis* exception provides that manufacturers or mobile service providers that offer two or fewer digital wireless handset models per air interface are exempt from the hearing aid compatibility deployment requirements, and manufacturers or mobile service providers that offer three digital wireless handset models per air interface must offer at least one compliant model. 47 C.F.R. § 20.19(e). This provision was affirmed in *Amendment of the Commission’s Rules* (continued ...)

effectiveness of the hearing aid compatibility rules, the Commission released an order that, among other things, adopted new compatible handset deployment benchmarks beginning in 2008.⁶

3. Of primary relevance, the Commission also adopted reporting requirements to ensure that it could monitor the availability of these handsets and to provide valuable information to the public concerning the technical testing and commercial availability of hearing aid-compatible handsets, including on the Internet.⁷ The Commission initially required manufacturers and digital wireless service providers to report every six months on efforts toward compliance with the hearing aid compatibility requirements for the first three years of implementation (May 17, 2004, November 17, 2004, May 17, 2005, November 17, 2005, May 17, 2006 and November 17, 2006), and then annually thereafter through the fifth year of implementation (November 19, 2007 and November 17, 2008).⁸ In its 2008 *Hearing Aid Compatibility First Report and Order*, the Commission extended these reporting requirements with certain modifications on an open ended basis, beginning January 15, 2009.⁹ The Commission also made clear that these reporting requirements even apply to manufacturers and service providers that fit the *de minimis* exception.¹⁰ In addition, the Commission instituted a requirement that manufacturers and service providers with publicly-accessible web sites maintain a list of hearing aid-compatible handset models and certain information regarding those models on their web sites.¹¹ The web site postings, which must be updated within 30 days of a change in a manufacturer's or service provider's offerings, will enable consumers to obtain up-to-date hearing aid compatibility information from their service providers.¹²

4. ZTE, a handset manufacturer, failed to file the required reports for the periods July 1, 2008 through December 31, 2008 (due January 15, 2009) and January 1, 2009 through June 30, 2009 (due July 15, 2009). ZTE also failed to list available hearing aid-compatible handset models on its web site. The Wireless Telecommunications Bureau ("WTB") referred ZTE's apparent violations to the Enforcement Bureau for action.

5. On November 4, 2009, the Enforcement Bureau's Spectrum Enforcement Division issued a Letter of Inquiry ("LOI")¹³ to ZTE USA, Inc. ("ZTE USA"), a U.S. subsidiary of ZTE Corporation, to which ZTE USA responded on November 25, 2009.¹⁴ In ZTE USA's LOI Response, filed on behalf of

(Continued from previous page ...)

Governing Hearing Aid-Compatible Mobile Handsets, First Report and Order, 23 FCC Rcd 3406, 3435 ¶ 72 (2008) ("*Hearing Aid Compatibility First Report and Order*"), Order on Reconsideration and Erratum, 23 FCC Rcd 7249 (2008).

⁶ *Id.*, *Hearing Aid Compatibility First Report and Order*.

⁷ See *Hearing Compatibility First Report and Order*, 23 FCC Rcd at 3443 ¶ 91.

⁸ *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16787 ¶ 89; see also *Wireless Telecommunications Bureau Announces Hearing Aid Compatibility Reporting Dates for Wireless Carriers and Handset Manufacturers*, Public Notice, 19 FCC Rcd 4097 (Wireless Tel. Bur. 2004).

⁹ See *Hearing Aid Compatibility First Report and Order*, 23 FCC Rcd at 3445 ¶¶ 97-99.

¹⁰ *Id.* at 3446 ¶ 99.

¹¹ *Id.* at 3450 ¶ 112.

¹² *Id.*

¹³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mr. Xiang-Yang Jiang, CEO, ZTE USA, Inc. (November 4, 2009).

¹⁴ See Letter from Xiang-Yang Jiang, CEO, ZTE USA, Inc. to Susan M. Stickley, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (November 25, 2009) ("LOI Response").

ZTE, it acknowledged that ZTE did not file the required reports.¹⁵ ZTE USA explained that ZTE did not file “due to a mistake in understanding the new process.” ZTE USA noted that ZTE does provide hearing aid compatibility information in the equipment authorization test data submitted for each handset.¹⁶ ZTE USA further admitted that ZTE did not post the required information on its web site.¹⁷

III. DISCUSSION

A. Failure to File Timely Hearing Aid Compatibility Status Reports

6. Section 20.19(i)(1) of the Rules requires all handset manufacturers to file hearing aid compatibility status reports under the current rules initially on January 15, 2009 (covering the six month period ending December 31, 2008) and then annually beginning July 15, 2009.¹⁸ These reports are necessary to enable the Commission to perform its enforcement function and evaluate whether ZTE is in compliance with Commission mandates that were adopted to facilitate the accessibility of hearing aid-compatible wireless handsets. These reports also provide valuable information to the public concerning the technical testing and commercial availability of hearing aid-compatible handsets. ZTE did not timely file the reports covering the six month periods ending December 31, 2008 and June 30, 2009. Accordingly, we find that ZTE failed to timely file the hearing aid compatibility status reports due on January 15, 2009 and July 15, 2009 in apparent willful¹⁹ and repeated²⁰ violation of the requirements set forth in Section 20.19(i)(1) of the Rules.²¹

B. Failure to Post Required Information Concerning Hearing Aid-Compatible Handset Models on its Web Site

7. Section 20.19(h) of the Rules requires that, beginning January 15, 2009, each manufacturer and service provider that operates a publicly-accessible web site make available on its web site a list of all hearing aid-compatible handset models currently offered, the ratings of those models, and an explanation of the rating system. In addition, the Commission has stated that any changes to a manufacturer’s or service provider’s offerings must be reflected on its public web site listing within 30

¹⁵ *Id.* at 1. ZTE filed the report due July 15, 2009 on December 1, 2009, but to date has not filed the report due January 15, 2009.

¹⁶ *Id.*

¹⁷ *Id.* at 2. Following receipt of the Division’s LOI, ZTE USA posted the required information for its hearing aid-compatible handset models on its web site at www.zteusa-support.com.

¹⁸ 47 C.F.R. § 20.19(i)(1).

¹⁹ Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 ¶ 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”); see also *Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237 ¶ 12 (2008); *Regent USA*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10520, 10523 ¶ 9 (2007); *San Jose Navigation, Inc.*, Forfeiture Order 22 FCC Rcd 1040, 1042 ¶ 9 (2007).

²⁰ Section 312(f)(2) defines “repeated” as “the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2). As with the definition of “willful,” the Commission has interpreted the term to apply to forfeiture proceedings. See *Southern California, supra*.

²¹ 47 C.F.R. § 20.19(i)(1).

days of the change.²² These web site postings provide consumers up-to-date hearing aid compatibility information.

8. ZTE admitted that it failed to list all available hearing aid-compatible handset models and the ratings for those models on its web site within the required timeframe. ZTE also took no action to address this violation until after it received the Division's LOI. Accordingly, we find that ZTE apparently willfully and repeatedly violated the web site posting requirements set forth in Section 20.19(h) of the Rules.

C. Proposed Forfeiture

9. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²³ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²⁴ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²⁵ Under this standard, we conclude that ZTE is apparently liable for forfeiture for its failure to timely file the required hearing aid compatibility status reports in apparent willful and repeated violation of Section 20.19(i)(1) of the Rules,²⁶ and for its failure to post the required information regarding its hearing aid-compatible handsets on its web site in apparent willful and repeated violation of Section 20.19(h) of the Rules.

10. The Commission's *Forfeiture Policy Statement* and Section 1.80(b) of the Rules set a base forfeiture amount of \$3,000 for the failure to file required forms or information.²⁷ While the base forfeiture requirements are guidelines lending some predictability to the forfeiture process, the Commission retains the discretion to depart from these guidelines and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act.²⁸ In exercising such discretion, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁹

11. We have exercised our discretion to set a higher base forfeiture amount for violations of the wireless hearing aid compatibility reporting requirements. In the *American Samoa Telecommunications Authority NAL*, we found that the status reports are essential to the implementation

²² See *Hearing Compatibility First Report and Order*, 23 FCC Rcd at 3450 ¶ 112.

²³ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²⁴ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁵ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002).

²⁶ 47 C.F.R. § 20.19(i)(1).

²⁷ 47 C.F.R. § 1.80(b).

²⁸ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 22, 17101 ¶ 29. See also 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff may use these guidelines in particular cases [and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (*emphasis added*).

²⁹ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

and enforcement of the hearing aid compatibility rules.³⁰ The Commission relies on these reports to provide consumers with information regarding the technical specifications and commercial availability of hearing aid-compatible digital wireless handsets and to hold the digital wireless industry accountable to the increasing number of hearing-impaired individuals.³¹ We noted that when setting an \$8,000 base forfeiture for violations of the hearing aid-compatible handset labeling requirements, the Commission emphasized that individuals with hearing impairments could only take advantage of critically important public safety benefits of digital wireless services if they had access to accurate information regarding hearing aid compatibility features of handsets.³² We also noted that the Commission has upwardly adjusted the base forfeiture when noncompliance with filing requirements interferes with the accurate administration and enforcement of Commission rules.³³ Because the failure to file hearing aid compatibility status reports implicates similar public safety and enforcement concerns, we exercised our discretionary authority and established a base forfeiture amount of \$6,000 for failure to file a hearing aid compatibility report.³⁴ Consistent with *ASTCA*, we believe the established \$6,000 base forfeiture for each hearing aid compatibility reporting violation should apply here, for an aggregate forfeiture of \$12,000 (\$6,000 * 2 reporting violations).

12. Failure to file these reports, as is the case here, can have an adverse impact on the Commission's ability to ensure the commercial availability of hearing aid-compatible digital wireless handsets, to the detriment of consumers. We do not believe that the circumstances presented by the company warrant any downward adjustment of the proposed forfeiture amount. It is well established that a violator's lack of knowledge or erroneous beliefs are not a mitigating factor warranting a forfeiture reduction.³⁵ Accordingly, we propose a forfeiture of \$12,000 against ZTE for apparently willfully and repeatedly failing to timely file its January 15, 2009 and July 15, 2009 hearing aid compatibility status reports in violation of Section 20.19(i)(1) of the Rules.³⁶

13. Turning to the violation of the web posting requirements, no base forfeiture amount has previously been established for violation of Section 20.19(h) of the Rules. The fact that the *Forfeiture Policy Statement* does not specify a base amount does not indicate that no forfeiture should be imposed. The *Forfeiture Policy Statement* states that "any omission of a specific rule violation" from the forfeiture guidelines "should not signal that the Commission considers any unlisted violation as nonexistent or

³⁰ See *American Samoa Telecommunications Authority*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 16432 (Enf. Bur., Spectrum Enf. Div. 2008), *response pending* ("*ASTCA*").

³¹ See *ASTCA*, 23 FCC Rcd at 16436-7 ¶ 10.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See, e.g., *Profit Enterprises, Inc.*, 8 FCC Rcd 2846, 2846 ¶ 5 (1993) (denying the mitigation claim of a manufacturer/distributor who thought that the equipment certification and marketing requirements were inapplicable, stating that its "prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed ... ignorance of the law is [not] a mitigating factor"); *Lakewood Broadcasting Service, Inc.*, 37 FCC 2d 437, 438 ¶ 6 (1972) (denying a mitigation claim of a broadcast licensee who asserted an unfamiliarity with the station identification requirements, stating that licensees are expected "to know and conform their conduct to the requirements of our rules"); *Kenneth Paul Harris, Sr.*, 15 FCC Rcd 12933, 12935 ¶ 7 (Enf. Bur. 2000) (denying a mitigation claim of a broadcast licensee, stating that its ignorance of the law did not excuse the unauthorized transfer of the station); *Maxwell Broadcasting Group, Inc.*, 8 FCC Rcd 784, 784 ¶ 2 (MMB 1993) (denying a mitigation claim of a noncommercial broadcast licensee, stating that the excuse of "inadverten[ce], due to inexperience and ignorance of the rules ... are not reasons to mitigate a forfeiture" for violation of the advertisement restrictions).

³⁶ 47 C.F.R. § 20.19(i)(1).

unimportant.”³⁷ The Commission retains the discretion, moreover, to depart from the *Forfeiture Policy Statement* and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act.³⁸ As noted above, the base forfeiture amount for “failure to file required forms or information” is \$3,000.³⁹ In determining the appropriate forfeiture amount for violation of the web site information posting requirements, we take into account that these requirements are “essential to the proper functioning of our hearing aid compatibility rules” and serve to increase the availability of up-to-date hearing aid compatibility information to consumers and service providers.⁴⁰ Thus, we view a manufacturer’s or service provider’s failure to list the required hearing aid-compatible handset information on its web site as similar to its failure to submit the required hearing aid compatibility status report.

14. In particular, we find that the web site may be the primary means through which consumers obtain information, and that the updated information between status reports is likely to be critical to both consumers and service providers. As the Commission noted in the 2008 *Hearing Aid Compatibility First Report and Order*, information provided in the status reports will inevitably become dated over the course of a year.⁴¹ The web site postings, which must be updated within 30 days of a change in a manufacturer’s or service provider’s offerings, will enable consumers to obtain up-to-date hearing aid compatibility information from their service providers and will also enable service providers to readily obtain up-to-date information from their manufacturer suppliers.⁴² Accordingly, the same considerations that lead us to increase the base forfeitures for hearing aid compatibility status reporting violations also apply to the requirement for web posting. We therefore establish \$6,000 as the base forfeiture for violation of Section 20.19(h).

15. As noted above, ZTE acknowledged that it did not post the required information on its web site within the required timeframe and did not correct this failure until after it received the Division’s LOI, and ZTE presented no mitigating factors in its LOI Response justifying a downward adjustment to the \$6,000 base forfeiture. Accordingly, we propose a forfeiture of \$6,000 against ZTE for apparently willfully and repeatedly⁴³ failing to list its hearing aid-compatible models on its public web site in violation of Section 20.19(h) of the Rules.⁴⁴

16. Accordingly, we propose a total forfeiture of \$18,000 against ZTE for its apparent willful and repeated violations of Sections 20.19(i)(1) and 20.19(h) of the Rules.

³⁷ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099.

³⁸ *Id.*

³⁹ 47 C.F.R. § 1.80(b).

⁴⁰ See *Hearing Compatibility First Report and Order*, 23 FCC Rcd at 3450 ¶ 112.

⁴¹ *Id.*

⁴² *Id.*

⁴³ In this regard, we note that each manufacturer and service provider is required to continuously maintain the required information concerning its hearing aid-compatible handset models on its web site and to update the web sites within 30 days of a change in its handset offerings.

⁴⁴ 47 C.F.R. § 20.19(h).

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, ZTE Corporation **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eighteen thousand dollars (\$18,000) for failing to file its hearing aid compatibility status reports in apparent willful and repeated violation of the requirements set forth in Section 20.19(i)(1) of the Rules, and for failing to post required information concerning its hearing aid-compatible handset models on its public web site in apparent willful and repeated violation of Section 20.19(h) of the Rules.

18. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, ZTE Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

19. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. ZTE will also send electronic notification on the date said payment is made to Susan.Stickley@fcc.gov and Ricardo.Durham@fcc.gov.

20. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to Ricardo Durham at Ricardo.Durham@fcc.gov and Susan Stickley at Susan.Stickley@fcc.gov.

21. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

22. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Mr. Yin Yimin, President and CEO, ZTE Corporation, ZTE Plaza, Keji Road South, Hi-Tech Industrial Park, Nanshan District, Shenzhen, The People's Republic of China, and to Mr. Xiang-Yang Jiang, CEO, ZTE USA, Inc., 2425 North Central Expressway, Suite 323, Richardson, Texas 75080.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau